STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN CAMERON OLSON,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 205028
Arenac Circuit Court
LC No. 96-2328 FH

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to nine to twenty years in prison. Defendant appeals as of right. We affirm.

Defendant first argues that insufficient evidence was presented at trial to support his conviction of first-degree criminal sexual conduct. We disagree.

To determine whether sufficient evidence was presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Questions of credibility should be left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

"Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(l); MSA 28.788(1)(l). Here, complainant testified that defendant forced him to perform fellatio on defendant in the summer of 1990 or 1991, in the bedroom of his grandparents' trailer. Complainant's testimony that defendant engaged in sexual penetration was sufficient evidence from which a jury could conclude that penetration took place. *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980). Furthermore, the evidence indicated that complainant was twelve years old in the summer of 1991. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that defendant engaged in sexual penetration with complainant, who was less than thirteen years of age at the time. *Jaffray, supra*, 445 Mich 296. Therefore, defendant's first-degree criminal sexual conduct conviction was supported by sufficient evidence.

Second, defendant argues that prosecutorial misconduct deprived him of his right to a fair trial. The test for prosecutorial misconduct is whether the prosecutor's conduct denied the defendant a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995). However, because defendant did not object at trial to the prosecutor's statements he now claims were improper, this Court may only review the statements if the failure to do so would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). After having reviewed the record, we find no improper conduct on the part of the prosecutor.

Defendant next argues that the trial court erred in allowing the prosecution to present evidence of earlier instances of sexual contact between defendant and complainant. We disagree. We will not disturb a trial court's decision regarding the admission of evidence absent an abuse of discretion. *People v Sawyer,* 222 Mich App 1, 5; 564 NW2d 62 (1997).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if 1) it is relevant to an issue other than character or propensity, 2) it is relevant to an issue of fact or consequence at trial, and 3) its probative value is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993); *People v Starr,* 457 Mich 490, 496; 577 NW2d 673 (1998). Here, the evidence of prior sexual acts between defendant and complainant was not admitted to show defendant's character or to show that defendant had a propensity to commit such acts. Rather, the evidence was relevant to the jury's weighing of complainant's credibility. *People v Wright,* 161 Mich App 682, 687; 411 NW2d 826 (1987). Complainant's credibility was clearly an issue of consequence at trial. Furthermore, in sexual misconduct cases, the probative value of such evidence outweighs the danger of unfair prejudice where, as here, the complainant's description of the charged offense, standing alone, appears somewhat improbable, and the other acts tend to show similar improper contact between the defendant and the person with whom he allegedly committed the charged offense. *Wright, supra,* 161 Mich App 687; *People v DerMartzex,* 390 Mich 410, 413; 213 NW2d 97 (1973). We further note that the jury was instructed that the evidence was not to be considered as

evidence of defendant's guilt. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence of prior sexual acts between defendant and complainant.

Finally, defendant challenges the sentence imposed by the trial court. This Court reviews sentences for an abuse of discretion. *People v Williams*, 223 Mich App 409, 410; 566 NW2d 649 (1997). First, defendant argues that the trial court misscored OV 2. However, because defendant argues that the trial court misapplied the guideline variables and misinterpreted the instructions regarding how the guidelines should be applied, his challenge fails to state a cognizable claim for appellate relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Second, defendant argues that his sentence of nine to twenty years' imprisonment violated the principle of proportionality. We disagree. Defendant's sentence falls within the minimum sentence range suggested by the guidelines and, therefore, the sentence is presumed to be proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant failed to identify any unusual circumstances at the sentencing hearing to overcome the presumption of proportionality. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Accordingly, we conclude that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff